Supreme Court of the United States

OCTOBER TERM, 1924

No. 103 and No. 327

ALPHA PORTLAND CEMENT COMPANY,
Plaintiff in Error,

v.

COMMONWEALTH OF MASSACHUSETTS,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

INDEX.

PAGE

Statement of the case 1

The Massachusetts corporation tax law 3

Computation and assessment of the taxes in controversy . 10

Argument 12

I. Matters settled by the decisions of the Massachusetts court 12

A. The taxes complained of were excises and not property taxes 13

B. The statutes by their terms are applicable to the petitioner 15

C. The Commissioner in computing the taxes in controversy followed the terms of the statutes . . 17

II. The Massachusetts corporation tax law in its application to the petitioner is constitutional 19

A. The tax, so far as measured by the value of the corporate excess employed within the Commonwealth, is valid as to foreign corporations engaged solely in interstate commerce 24

B. The tax, so far as measured by net income derived from business within the Commonwealth, is valid as to foreign corporations engaged solely in interstate commerce 31

III. The taxes assessed were measured by the value of property used and net income earned within the Commonwealth 43

Appendix 51

LIST OF CASES CITED.

PAGE

Adams Express Co. v. Ohio State Auditor, 165 U. S. 194 25, 27, 42, 46
Atlantic & Pacific Tel. Co. v. Philadelphia, 190 U. S. 160 . . 26
Atlantic Coast Line v. Daughton, 262 U. S. 413 . . . 33, 38, 49
Attorney General v. Electric Storage Battery Co., 188 Mass. 239 8, 17, 20
Bacon v. Illinois, 227 U. S. 504 25
Baltic Mining Co. v. Commonwealth, 207 Mass. 381 . 8, 9, 17, 20
Baltic Mining Co. v. Massachusetts, 231 U. S. 68 . . 9, 14, 20, 28
Board of Assessors v. Comptoir National D'Escompte, 191 U. S. 388 27
Bristol v. Washington County, 177 U. S. 133 27
Brown v. Houston, 114 U. S. 622 25
Cheney Brothers Co. v. Massachusetts, 246 U. S. 147 . . . 9, 20
Coe v. Errol, 116 U. S. 517 25
Commonwealth v. Hamilton Mfg. Co., 12 Allen, 298 . . . 13
Commonwealth v. People's Five Cents Savings Bank, 5 Allen, 428 13
Crew Levick Co. v. Pennsylvania, 245 U. S. 292 . . . . 12, 22
Cudahy Packing Co. v. Minnesota, 246 U. S. 450 . . 25, 28, 30, 49
Eaton, Crane & Pike Co. v. Commonwealth, 237 Mass. 523 . . 13, 14
Farncomb v. Denver, 252 U. S. 7 12
Flint v. Stone Tracy Co., 220 U. S. 107 28
Galveston, Harrisburg & San Antonio Ry. Co. v. Texas, 210 U. S. 217 22
Hamilton Co. v. Massachusetts, 6 Wall. 632 14
Horn Silver Mining Co. v. New York, 143 U. S. 305 . . . 26
International Harvester Co. v. Kentucky, 234 U. S. 575 . . . 15
International Paper Co. v. Massachusetts, 246 U. S. 135 . . 9, 21
Judson Freight Forwarding Co. v. Commonwealth, 242 Mass. 47 8, 9, 13, 16
Knowlton v. Moore, 178 U. S. 41 40
Lacoste v. Dept. of Conservation of Louisiana, U. S. Sup. Ct., decided January 7, 1924 12
Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61 . . . 12
Liverpool, etc., Ins. Co. v. Orleans Assessors, 221 U. S. 346 . . 27
Looney v. Crane Co., 245 U. S. 178 21
Maine v. Grand Trunk Ry. Co., 142 U. S. 217 . . . . . 22, 49
Marconi Wireless Telegraph Co. v. Commonwealth, 218 Mass. 558 8, 20

PAGE

McCall *v.* California, 136 U. S. 104 15
Metropolitan Life Ins. Co. of New York *v.* New Orleans, 205 U. S. 395 27
Morley *v.* Lake Shore Ry. Co., 146 U. S. 162 12
New Orleans *v.* Stempel, 175 U. S. 309 27
Old Dominion Co. *v.* Commonwealth, 237 Mass. 269 8
Peck & Co. *v.* Lowe, 247 U. S. 165 33
Pittsburg, etc., Ry. Co. *v.* Backus, 154 U. S. 421 45
Portland Bank *v.* Apthorp, 12 Mass. 252 13
Postal Telegraph Cable Co. *v.* Adams, 155 U. S. 688 . 25, 26, 27, 29
Provident Institution *v.* Massachusetts, 6 Wall. 611 14
Pullman Co. *v.* Richardson, 261 U. S. 330 . . 22, 25, 28, 30, 44, 49
Pullman's Palace Car Co. *v.* Pennsylvania, 141 U. S. 18 . 21, 25, 29, 45
S. S. White Dental Manuf. Co. *v.* Commonwealth, 212 Mass. 35 8, 13, 29
Schwab *v.* Richardson, U. S. Sup. Ct., decided November 12, 1923 39
Shaffer *v.* Carter, 252 U. S. 37 . . . . . 15, 27, 32, 33, 36
St. Louis Southwestern Ry. Co. *v.* Arkansas, 235 U. S. 350 . 12, 46
State Tax on Railway Gross Receipts, 15 Wall. 284 22
Texas Transport & Terminal Co. *v.* New Orleans, U. S. Sup. Ct., decided February 18, 1924 . . . . . 26, 39
Travis *v.* Yale & Towne Manuf. Co., 252 U. S. 60 32
Underwood Typewriter Co. *v.* Chamberlain, 254 U. S. 113 33, 37, 41, 46, 49
United States Express Co. *v.* Minnesota, 223 U. S. 335 12, 22, 25, 30, 49
United States Glue Co. *v.* Oak Creek, 247 U. S. 321 . . 33, 34, 41
Wallace *v.* Hines, 253 U. S. 66 46
Western Union Telegraph Co. *v.* Kansas, 216 U. S. 1 21
Western Union Telegraph Co. *v.* Massachusetts, 125 U. S. 530 21, 27, 28, 45

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v.

COMMONWEALTH OF MASSACHUSETTS,
DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

These are suits for the recovery of taxes assessed to the petitioner as a foreign corporation doing business in Massachusetts. Concededly that business was purely interstate. The corporation contends that for that reason the levying of the taxes in question was in contravention of provisions of the Constitution of the United States. The facts in each case are set out in an agreed statement. In both cases the state court held that the taxes were valid.

It is unnecessary to rehearse at length the nature

of the petitioner's business. It is a New Jersey corporation engaged in the manufacture and sale of cement. It has mills in several states from which cement is shipped to its customers. It has an office in Boston in charge of a district sales manager, with a clerk, which is used as headquarters by traveling salesmen employed by the petitioner, who solicit orders for cement throughout New England. Correspondence is conducted, orders made up, and records of shipments kept at the Boston office. Speaking generally, the petitioner's business in Massachusetts consists in negotiating sales and making deliveries of cement to customers there and in other New England States (Rec. No. 103, pp. 18, 19; Rec. No. 327, pp. 32, 33).

The petitioner has tangible property in Massachusetts consisting of office furniture valued at about $500 (Rec. No. 103, p. 19). Intangible assets having a situs in Massachusetts such that they might be subject to a property tax in that State are the corporate franchise employed in the Commonwealth and credits arising from the sale of cement to residents of Massachusetts (Rec. No. 327, p. 33). Annual gross receipts assignable to Massachusetts, as shown by the petitioner's returns, in 1920 amounted to $424,982.70 and in 1921 to $343,204.60 (Rec. No. 103, folio p. 15; Rec. No. 327, p. 20).

The taxes assailed were excises for the years 1921 and 1922 assessed to the petitioner under G. L., c. 63, and St. 1921, cc. 361 and 493. G. L., c. 63, embodies the Massachusetts corporation tax law. The taxes assessed thereunder were $800.06 for 1921 and $590.54 for 1922 (Rec. No. 103, p. 20; Rec. No. 327,

p. 35). St. 1921, c. 361, imposing a minimum tax under G. L., c. 63, for the year 1921, did not affect the amount of the tax assessed to the petitioner for that year (Rec. No. 103, p. 22). St. 1921, c. 493, imposed an additional tax for the year 1921, under which a tax was assessed to the petitioner amounting to $0.39 (Rec. No. 103, p. 20).

THE MASSACHUSETTS CORPORATION TAX LAW.

The principle and general scheme of the Massachusetts corporation tax law is carefully explained in the state court's opinion in the first of the two cases, No. 103 of 1924. Relevant parts of the statutes are set out in an appendix to that opinion, and are annexed to this brief.

Provision is made for the taxation of domestic and foreign business corporations in sections 30 to 52 of G. L., c. 63, sections 39 to 43 relating particularly to foreign corporations. These provisions, first enacted in Gen. St. 1919, c. 355, are a considerable departure from earlier corporation tax laws. They provide for the levy of an excise on both domestic and foreign business corporations doing business in the Commonwealth, with respect to such business. The excise in both cases is the sum of two percentages. It is measured by two factors, one of which relates to property in the Commonwealth and the other to net income derived from business therein. This excise tax is in place of any other tax on property, except real estate and machinery, which alone, when owned by domestic or foreign business corporations, are subject to local taxation. G. L., c. 59, § 5, cl. 16th.

As to a foreign corporation (section 39) the excise is equal to the sum of "(1) an amount equal to five dollars per thousand upon the value of the corporate excess employed by it within the Commonwealth" and "(2) an amount equal to two and one-half per cent of that part of its net income . . . which is derived from business carried on within the Commonwealth," with a further provision for a minimum tax which did not enter into the computation of the taxes assessed to the petitioner. "Corporate excess employed within the Commonwealth" by a foreign corporation is defined by section 30, clause 4, to be such proportion of the fair cash value of all its shares of capital stock on April first as the value of its real and personal assets employed in business within the Commonwealth bears to the value of its total assets on that date, less the value of (*a*) real estate and machinery owned by it within the Commonwealth subject to local taxation, and (*b*) securities held within the Commonwealth the income of which, if held by a natural person, would not be subject to taxation. "Net income" is defined by section 30, clause 5, to mean generally as to a foreign corporation the net income for the taxable year (preceding fiscal year) required to be returned to the Federal Government, less interest received on bonds, notes and certificates of indebtedness of the United States.

A statutory method for determining the net income of a foreign corporation derived from business carried on within the Commonwealth is provided by section 41. This method requires the allocation of gains from sale of capital assets and interest according to the source from which they are derived, and

the allocation of the remainder, in the case of a foreign business corporation carrying on business within and without the Commonwealth, according to the rule stated in section 38, by dividing the remainder into three equal parts, of which one-third is to be multiplied by the ratio of the corporation's tangible property situated within the Commonwealth to the value of such property wherever situated, another third is to be multiplied by the ratio of the expenditure for the taxable year for wages, salaries and commissions to employees assignable to the Commonwealth to the total of such expenditure, and the remaining third is to be multiplied by the ratio of the gross receipts for the taxable year from business assignable to the Commonwealth to the gross receipts from all business. It is provided by section 42 that a foreign corporation carrying on part of its business outside the Commonwealth may refuse to accept determination of the amount of business assignable to the Commonwealth by the allocating method provided in section 41, by notifying the Commissioner of Corporations and Taxation and filing a statement showing the amount of its annual net income derived from business carried on within the Commonwealth, from which the Commissioner is required to determine the proportion of the net income received from business carried on within the Commonwealth. Section 43 provides for a credit to the corporation of five per cent of the dividends paid during the previous calendar year to inhabitants of Massachusetts.

The method for determining the value of the corporate excess employed within the Commonwealth by a foreign corporation, as has been stated, is pro-

vided by section 30, clause 4. There is however no provision giving a rule for determining the value of assets employed in business within the Commonwealth, upon which the value of the corporate excess employed within the Commonwealth is made to depend, and in the case of intangible assets such valuation is difficult except by an allocating rule. But section 47 (Gen. St. 1919, c. 355, §§ 7, 22) authorizes the Commissioner to make such reasonable rules and regulations as he may deem necessary for carrying out the provisions of sections 30 to 51, inclusive; and pursuant to the authority so granted the following general ruling for allocating the value of intangible assets was made by the Commissioner and has since been continuously in force:

"2505. Ordinarily, such proportion of an intangible asset employed in business will be deemed to be employed in business within Massachusetts as that portion of the remainder of income allocable in Massachusetts under the provisions of section 19 of the act (G. L., c. 63, § 41) bears to the total of said remainder. If, however, because of the peculiar circumstances of any particular case such method of apportionment does not fairly reflect the proportion of an asset employed in business in Massachusetts, the corporation may submit its reasons for requesting determination by another method. The department also reserves the right in such cases to make the apportionment by another rule, even though the corporation does not request determination by another method; but in such event the corporation will be notified." (Rec. No. 327, p. 34.)

The effect of this ruling, it will be observed, is to apply to the valuation of intangible assets employed within the Commonwealth the same allocating method which the statute provides for the deter-

mination of net income derived from business within the Commonwealth; and provision is made, as in section 42, for the employment of another method, if requested by the corporation, where the allocating method is thought to be unfair in its application.

In this corporation tax law, enacted in 1919 and now embodied in G. L., c. 63, the Legislature has attempted to adopt a general principle whereby domestic and foreign corporations should be treated with fairness on the same footing as to taxation, avoiding on the one hand a basis for taxation of foreign corporations offensive to the limitations imposed by the Constitution of the United States and on the other hand the preferences in favor of foreign corporations which were inherent in the earlier system. This law places both domestic and foreign corporations on common ground as to taxation except so far as essential differences require different treatment in details. As to both domestic and foreign corporations one factor of the tax is net income derived from business carried on within the Commonwealth. As to both the other factor of the tax is corporate excess, that is, property, determined after deducting the value of property locally taxed in Massachusetts and securities the income of which if received by an individual resident would not be taxable, with certain exceptions, while the value of property outside the jurisdiction is excepted, in the case of foreign corporations, by the provision for a proportion, and in the case of domestic corporations, as to real estate and tangible personal property, by the provision for a deduction of its value (G. L., c. 63, § 30, cl. 3, and § 32). Both are

exempt from payment of local taxes except on real estate and machinery.

See Opinion of the State Court in No. 103 of 1924.

Judson Freight Forwarding Co. *v.* Commonwealth, 242 Mass. 47.

The present tax law differs essentially from the earlier tax law respecting foreign corporations. The earlier law (St. 1903, c. 437, § 75, and St. 1909, c. 490, pt. III, §§ 54–56) imposed an excise on foreign corporations measured by the amount of capital stock, with no provision for apportionment depending on the amount of business done in the State. It was in the nature of a license fee for the privilege of doing intrastate business. The right to do business depended upon payment of the tax, and prohibitive penalties followed failure to comply with the statutes and to make the specified payment. For that reason it was held that those statutes did not apply to corporations engaged solely in interstate commerce at a place of business within the Commonwealth.

Attorney General *v.* Electric Storage Battery Co., 188 Mass. 239.

Baltic Mining Co. *v.* Commonwealth, 207 Mass. 381.

S. S. White Dental Manuf. Co. *v.* Commonwealth, 212 Mass. 35.

Marconi Wireless Telegraph Co. *v.* Commonwealth, 218 Mass. 558, 561, 563–567.

Old Dominion Co. *v.* Commonwealth, 237 Mass. 269, 276.

Baltic Mining Co. *v.* Massachusetts, 231 U. S. 68.
International Paper Co. *v.* Massachusetts, 246 U. S. 135.
Cheney Brothers Co. *v.* Massachusetts, 246 U. S. 147.

The present tax law imposes an excise on foreign corporations for the privilege of doing business in Massachusetts under the protection of its laws and with the financial, commercial and other advantages flowing therefrom, measured solely by the property and net income fairly attributable to the business done within the State. Payment of the tax is not made a condition precedent to the doing of business. Collection of the tax is to be made by ordinary methods. There is no discrimination either against foreign corporations or against interstate commerce.

See Opinion of the State Court in No. 103 of 1924.
Judson Freight Forwarding Co. *v.* Commonwealth, 242 Mass. 47.
Cf. Baltic Mining Co. *v.* Commonwealth, 207 Mass. 381, 384.

The additional tax imposed by St. 1921, c. 493, was an excise for the year 1921 alone, levied on both domestic and foreign business corporations, of three-fourths of one per cent of their net income for the preceding fiscal year apportioned to the Commonwealth as provided by the act.

Computation and Assessment of the Taxes in Controversy.

The taxes for 1921 and 1922 under G. L., c. 63, were computed according to the terms of the statute and the ruling referred to above. The computation by which the amount equal to two and one-half per cent of the net income derived from business carried on within the Commonwealth was determined was made in accordance with the requirements of the statute, and the computation by which the amount equal to five dollars per thousand upon the value of the corporate excess employed within the Commonwealth was determined was made in accordance with the provisions of the statute and the Commissioner's ruling. Details of the calculations appear in the record, but need not be recited here. For the year 1921 the Commissioner determined the value of the corporate excess employed within the Commonwealth to be $84,001.21 out of a total value of assets amounting to $21,076,282.74, and the net income derived from business carried on within the Commonwealth during the previous year to be $15,370.06 out of a total net income amounting to $1,148,041.70 (Rec. No. 103, folio pp. 13, 15, p. 14). For the year 1922 he determined the value of the corporate excess employed within the Commonwealth to be $75,932.08 out of a total value of assets amounting to $21,406,098.39, and the net income derived from business carried on within the Commonwealth during the previous year to be $9,202.53 out of a total net income amounting to $707,577.98 (Rec. No. 327, pp. 17, 19, 26, 27, 34, 35).

The petitioner at no time requested the Commissioner to determine the part either of the net income or of the intangible assets assignable to Massachusetts by any other method than the allocating method provided by the statute and the ruling respectively (Rec. No. 327, p. 34).

In the case of the 1921 tax the part measured by net income was $380.05 and the part measured by corporate excess was $420.01, making a total of $800.06 (Rec. p. 103, p. 14). In the case of the 1922 tax the part measured by net income was $187.91 and the part measured by corporate excess was $379.66, and there was a further item of $22.97 for interest, making a total of $590.54 (Rec. No. 327, p. 35).

The tax bill for the additional tax assessed under St. 1921, c. 493, amounting to $0.39, shows that it was based on a percentage of net income apportioned to the Commonwealth amounting to $52.63 (Rec. p. 103, p. 15). The computation by which the apportionment was determined is not given.

In the first of the two cases, involving the 1921 taxes, it was agreed that the amount of the tax assessed was not questioned and that no question of valuation was involved (Rec. No. 103, p. 20). In the second case, involving the 1922 tax, it was agreed for the purposes of the case that the mathematical computations of the Commissioner were correct, and that the valuation of specific items of assets was fair (Rec. 327, pp. 35, 36).

ARGUMENT.

I.

MATTERS SETTLED BY THE DECISIONS OF THE MASSACHUSETTS COURT.

The construction put upon a state statute by the highest court of the State must be accepted by the courts of the United States and be regarded as a part of the statutory provision, when they are called upon to determine whether it violates any right secured by the Federal Constitution. But the decision of a state court respecting the description or characterization of a statute and its operation and effect, when the statute is challenged on the ground that it is repugnant to the Federal Constitution, will not necessarily control.

Morley *v.* Lake Shore Ry. Co., 146 U. S. 162, 166–167.

Lindsley *v.* Natural Carbonic Gas Co., 220 U. S. 61, 73.

United States Express Co. *v.* Minnesota, 223 U. S. 335, 342, 346.

St. Louis S. W. Ry. *v.* Arkansas, 235 U. S. 350, 362.

Crew Levick Co. *v.* Pennsylvania, 245 U. S. 292.

Farncomb *v.* Denver, 252 U. S. 7, 10.

Lacoste *v.* Dept. of Conservation of Louisiana, U. S. Sup. Ct., decided January 7, 1924.

In the light of these principles certain matters decided by the state court seem to be settled.

A.

The Taxes complained of were Excises and not Property Taxes.

In Judson Freight Forwarding Co. *v.* Commonwealth, 242 Mass. 47, 51, the state court decided that the tax imposed by Gen. St. 1919, c. 355, now codified in G. L., c. 63, was an excise and not a property tax. This view of the tax law is reaffirmed in the opinion of the court in No. 103 of 1924. If it were not an excise it would not be in conformity with the requirements of the Massachusetts Constitution. It has long been the legislative policy of Massachusetts to levy excises instead of property taxes on corporate franchises and corporate business.

> Portland Bank *v.* Apthorp, 12 Mass. 252.
> Commonwealth *v.* People's Five Cents Savings Bank, 5 Allen, 428, 431.
> Commonwealth *v.* Hamilton Mfg. Co., 12 Allen, 298, 300.
> S. S. White Dental Manuf. Co. *v.* Commonwealth, 212 Mass. 35, 38–41.
> Eaton, Crane & Pike Co. *v.* Commonwealth, 237 Mass. 523, 526–528.

The reasons for holding the tax imposed by the statute of 1919 to be an excise were stated by the court in Judson Freight Forwarding Co. *v.* Commonwealth as follows:

"It is named an 'excise' in the statute. The declared purpose of the Legislature is accepted unless inconsistent with

the meaning and effect of the enactment. . . . It is levied in 'respect to the carrying on or doing of business by it within the Commonwealth.' It is an excise for the commodity or privilege of having a place of business in Massachusetts with the protection of our laws and the financial, commercial and other advantages appertaining thereto."

This court has on several occasions approved of the conclusion of the state court with respect to earlier corporation tax laws that the taxes imposed thereby were excises and not property taxes.

> Provident Institution *v.* Massachusetts, 6 Wall. 611, 623.
> Hamilton Co. *v.* Massachusetts, 6 Wall. 632.
> Baltic Mining Co. *v.* Massachusetts, 231 U. S. 68, 84.

So far as the question is one of legislative intent the decision of the state court on the point would seem to be final. If the question is a broader one it is submitted that the decision of the state court was right and in accordance with the views of this court as expressed in earlier cases.

For similar reasons the tax imposed by St. 1921, c. 493, was an excise. It is called an "excise tax" and is similar in nature to the tax imposed by Gen. St. 1918, c. 253, which in Eaton, Crane & Pike Co. *v.* Commonwealth, 237 Mass. 523, 526–528, the court held to be an excise tax.

Being excises these taxes are not taxes *on* property or net income, but taxes *measured by* property and net income, used in or derived from business done in Massachusetts.

B.

The Statutes by their Terms are Applicable to the Petitioner.

G. L., c. 63, § 30, cl. 2, defines "foreign corporation" to mean "every corporation, association or organization established, organized or chartered under laws other than those of the Commonwealth, for purposes for which domestic corporations may be organized under chapter one hundred and fifty-six, which has a usual place of business in this Commonwealth" or is engaged there in construction work. By G. L., c. 156, § 2, that chapter, entitled "business corporations," is made applicable to all domestic corporations having a capital stock established either by general or special law for the purpose of carrying on business for profit, except corporations organized for the purpose of doing a banking business, insurance companies, public service corporations and other corporations of a similar nature. G. L., c. 63, § 39, imposes an excise on "every foreign corporation" "with respect to the carrying on or doing of business by it within the Commonwealth."

The petitioner is a business corporation, carrying on business for profit. It "has a usual place of business in this Commonwealth." During the taxable period it was doing business in Massachusetts, although that business was interstate commerce.

McCall *v.* California, 136 U. S. 104.
International Harvester Co. *v.* Kentucky, 234 U. S. 575.
Shaffer *v.* Carter, 252 U. S. 37, 57.

The business which the petitioner was doing in Massachusetts yielded, according to its returns, annual gross receipts assignable to Massachusetts of $424,982.70 in 1920 and $343,204.60 in 1921.

The petitioner therefore comes precisely within the express terms of G. L., c. 63. The state court has so declared in its opinion reported in No. 103 of 1924:

"As matter of verbal construction it is plain that the tax law includes a foreign corporation such as the petitioner. Confessedly the petitioner 'has a usual place of business in this Commonwealth' and is actually carrying on business here. The petitioner comes within the description of s. 30, 2, where foreign corporation is defined as including every corporation 'chartered under laws other than those of the Commonwealth for purposes for which domestic corporations may be organized under chapter one hundred fifty-six, which has a usual place of business in this Commonwealth'."

See also Judson Freight Forwarding Co. *v.* Commonwealth, 242 Mass. 47, 51.

It is equally plain that the petitioner comes within the description of St. 1921, c. 493, which is expressly made applicable to "every corporation subject to the provisions of sections thirty to sixty, inclusive, of chapter sixty-three of the General Laws."

Whether the petitioner is subject to these tax laws depends, however, upon the further question whether the statutes so construed would be constitutional. As the state court said:

"Whether these statutory words are to be interpreted so as to include foreign corporations engaged here exclusively in interstate commerce depends upon the further inquiry whether as thus construed the statute would be constitutional."

See also Attorney General *v.* Electric Storage Battery Co., 188 Mass. 239, 240, 241.
Baltic Mining Co. *v.* Commonwealth, 207 Mass. 381, 390.

Considering that question the court concluded:

"The tax statute, therefore, is interpreted as applying to a corporation engaged in business within the Commonwealth as is the petitioner."

The question whether the corporation tax law of Massachusetts, as applied to a corporation doing a business in this Commonwealth which is exclusively interstate commerce, is constitutional, is the principal question which must be considered here.

C.

The Commissioner in Computing the Taxes in Controversy followed the Terms of the Statutes.

Before approaching the main question of the constitutionality of the statutes as applied to the petitioner it should be pointed out that there can be no controversy before this court but that the method which the Commissioner pursued in determining and assessing the taxes in controversy was in compliance with the statutes. The record shows that the Commissioner in determining both the value of the corporate excess employed by the petitioner within the Commonwealth and in determining the part of the petitioner's net income derived from business carried on within the Commonwealth, for the purpose of assessing the 1921 and 1922 taxes under G. L., c. 63, fol-

lowed the directions contained in the statutes and in the Commissioner's general ruling. It is agreed that the computations of the Commissioner were correctly made and that his valuation of specific items of assets was fair. It is not contended that the petitioner made any request of the Commissioner to determine either the value of the intangible assets employed within the Commonwealth or the part of the net income derived from business carried on within the Commonwealth by any alternative method. With regard to the assessment of the 1922 tax the court said in the opinion in No. 327 of 1923:

"Without pursuing the details of the method of computation to ascertain these two elements, it is enough to say that it is in conformity to the statute. This conclusion finds confirmation in the fact that the petitioner failed to exercise the option, extended to it by the ruling of the Commissioner already quoted, of requesting an apportionment by some other method."

The method by which, acting under St. 1921, c. 493, the Commissioner determined the petitioner's net income apportioned to the Commonwealth to be $52.63 and the tax to be $0.39 is not stated. It is not, however, contended that the Commissioner in making that determination and assessment did not comply with the terms of the statute.

We come, therefore, now directly to the question whether or not the statutes in question so construed and applied are constitutional.

II.

THE MASSACHUSETTS CORPORATION TAX LAW IN ITS APPLICATION TO THE PETITIONER IS CONSTITUTIONAL.

One of the chief sources of revenue available to a State is the taxation of corporations doing business within its borders. Various systems of taxation have been devised by different States at different times of which some have been sustained and others have fallen before the test of constitutionality when brought to the bar of this court. On account of the variety of methods employed in attempts to levy taxes which will cover the corporate field as widely as possible and yet be valid, it is somewhat difficult to deduce the guiding principles on which the decisions rest. The following observations, however, seem to be justified.

Corporation taxes under state laws may be classified according to the measure or kind of tax as taxes on or measured by (1) capital stock, (2) gross receipts, (3) property, and (4) net income. They may be unconstitutional because of either (1) interference with interstate (or foreign) commerce, or (2) violation of the Fourteenth Amendment. Interference with interstate commerce is found where the tax is of a kind which in the court's view imposes a direct burden on such commerce, or in some way discriminates against it. Violation of the Fourteenth Amendment is a ground of invalidity where it is attempted to tax a foreign corporation with respect to property or business done outside the State, or in

such a way as to discriminate against that class of corporations.

The earlier foreign corporation tax law of Massachusetts measured the amount of the tax by the amount of capital stock, but with a maximum limit of $2,000. This law was held to be inapplicable to corporations engaged exclusively in interstate commerce because if so applied the tax would be a direct burden on such commerce. As to corporations engaged in local business as well, the law was construed as imposing a reasonable license fee for the privilege of doing that local business, which did not directly burden interstate commerce, or constitute an attempt to tax property beyond the jurisdiction of the State, or result in undue discrimination against such corporations, and was therefore held to be constitutional.

Attorney General *v.* Electric Storage Battery Co., 188 Mass. 239.

Baltic Mining Co. *v.* Commonwealth, 207 Mass. 381.

S. S. White Dental Manuf. Co. *v.* Commonwealth, 212 Mass. 35.

Marconi Wireless Tel. Co. *v.* Commonwealth, 218 Mass. 558.

Baltic Mining Co. *v.* Massachusetts, 231 U. S. 68.

Cheney Brothers Co. *v.* Massachusetts, 246 U. S. 147.

But St. 1914, c. 724, § 1, removing the maximum limit, was declared unconstitutional both as placing a prohibited burden on interstate commerce and as

laid on property of a foreign corporation located and used beyond the jurisdiction of the State.

International Paper Co. *v.* Massachusetts, 246 U. S. 135, 145.

In this decision the principles laid down in Western Union Telegraph Co. *v.* Kansas, 216 U. S. 1, and Looney *v.* Crane Co., 245 U. S. 178, were reaffirmed. In Western Union Telegraph Co. *v.* Kansas the principle is stated in these words:

"If the statute, reasonably interpreted, either directly or by its necessary operation, burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted, and although the company may do both interstate and local business.

. . . . . .

Looking, then, at the natural and reasonable effect of the statute, disregarding mere forms of expression, it is clear that the making of the payment by the Telegraph Company, as a charter fee, of a given per cent of its authorized capital, representing, as that capital clearly does, all of its business and property, both within and outside of the State, a condition of its right to do local business in Kansas, is, in its essence, not simply a tax for the privilege of doing local business in the State, but a burden and tax on the company's interstate business and on its property located or used outside of the State."

On the other hand taxes on capital stock have been sustained as being in effect taxes on property, where in the court's view, no undue burden on interstate commerce was imposed.

Western Union Telegraph Co. *v.* Massachusetts, 125 U. S. 530.

Pullman's Palace Car Co. *v.* Pennsylvania, 141 U. S. 18.

Similar considerations have governed the decision of cases involving taxes on or measured by gross receipts on corporations engaged in interstate commerce. In several cases such taxes have been sustained.

State Tax on Railway Gross Receipts, 15 Wall. 284.
Maine *v.* Grand Trunk Ry. Co., 142 U. S. 217.
United States Express Co. *v.* Minnesota, 223 U. S. 335.
Pullman Co. *v.* Richardson, 261 U. S. 330.

In other cases such taxes have been held unconstitutional as a direct burden on interstate commerce.

Galveston, Harrisburg & San Antonio Ry. Co. *v.* Texas, 210 U. S. 217.
Crew Levick Co. *v.* Pennsylvania, 245 U. S. 292.

One part of the tax levied by G. L., c. 63, purports to be measured by the "value of the corporate excess employed . . . within the Commonwealth," and the other part by "that part of its net income . . . which is derived from business carried on within the Commonwealth." The tax levied by St. 1921, c. 493, purports to be measured by "net income . . . apportioned to this Commonwealth." "Corporate excess employed within the Commonwealth" by a foreign corporation, as we have seen, is defined by G. L., c. 63, § 30, cl. 4, to be such proportion of the fair cash value of all its shares of capital stock as

the value of its real and personal assets employed in business within the Commonwealth bears to the value of its total assets, less the value of (*a*) real estate and machinery owned by it within the Commonwealth subject to local taxation, and (*b*) securities held within the Commonwealth the income of which, if held by a natural person, would not be subject to taxation. The fair cash value of all the shares constituting the capital stock of a corporation is in substance and effect the market value of all its assets including its corporate franchise, and the proportionate part of such value equal to the ratio of its real and personal assets employed in business within the Commonwealth to the value of its total assets is the value of its real and personal assets, as part of a going concern, employed in business within the Commonwealth. The value of the corporate excess employed within the Commonwealth is therefore the value of property employed there.

We assume, for the purposes of present discussion, that the amounts computed as the respective measures from which the taxes in controversy were assessed were, as the statutes provide, the value of property employed within the Commonwealth and net income from business therein, leaving for later consideration any question involved in such assumption. The discussion therefore will require an analysis of decisions relating to taxes on or measured by property or net income. It will naturally be divided into two branches corresponding to the two parts of the tax.

A.

The Tax, so far as Measured by the Value of the Corporate Excess employed within the Commonwealth, is valid as to Foreign Corporations Engaged Solely in Interstate Commerce.

That part of the tax imposed on a foreign corporation by G. L., c. 63, which is measured by the value of the corporate excess employed within the Commonwealth differs fundamentally from the tax imposed by earlier statutes. It differs from a tax measured by the par value of the capital stock of a foreign corporation in that the basis of the measure is the market value of its assets and not the nominal value of its capital stock, and in that only a proportionate part of such market value corresponding to the value of assets within the Commonwealth is taken. It is a tax measured substantially by the value of the property of a foreign corporation, both real and personal, tangible and intangible, including the franchise, employed within the Commonwealth, less deductions on account of property locally taxed therein and certain securities held there. It is laid without discrimination either against foreign corporations or against interstate commerce.

The record shows that the petitioner had in Massachusetts tangible personal property valued at about $500, and intangible personal property, consisting of its corporate franchise employed in the Commonwealth and credits arising from the sale of cement to residents of Massachusetts, of substantial value.

The petitioner's contention as to this branch of the tax is that the value of all the assets of a foreign corporation, including intangible assets and the value of its franchise, employed within the Commonwealth, may not properly be used as the basis of a tax levied on a foreign corporation engaged exclusively in interstate commerce, both because the resulting tax imposes a direct burden on interstate commerce, and because it violates the provisions of the Fourteenth Amendment.

It is well established that property of a non-resident located within a State is subject to taxation by it, although the property is used exclusively in interstate commerce, except when it is actually in the course of an interstate journey, if the tax is laid without discrimination.

Brown *v.* Houston, 114 U. S. 622.
Coe *v.* Errol, 116 U. S. 517, 525, 528.
Pullman's Palace Car Co. *v.* Pennsylvania, 141 U. S. 18, 25.
Postal Telegraph Cable Co. *v.* Adams, 155 U. S. 688.
Adams Express Co. *v.* Ohio State Auditor, 165 U. S. 194.
United States Express Co. *v.* Minnesota, 223 U. S. 335, 344.
Bacon *v.* Illinois, 227 U. S. 504.
Cudahy Packing Co. *v.* Minnesota, 246 U. S. 450, 453.
Pullman Co. *v.* Richardson, 261 U. S. 330, 338.

In the dissenting opinion of Mr. Justice Brandeis in Texas Transport & Terminal Co. *v.* New Orleans, U. S. Sup. Ct., February 18, 1924, he says:

"It is settled law that interstate commerce is not directly burdened by a tax imposed upon property used exclusively in interstate commerce, Transportation Co. *v.* Wheeling, 99 U. S. 273, 284; Dominion Steamship Co. *v.* Virginia, 198 U. S. 299, 306."

Apparently the petitioner concedes the application of this rule to tangible personal property, but contends that the rule is otherwise with respect to intangible assets such as a corporate franchise and credits due from residents.

So far as the franchise is concerned the point seems to be concluded by the decisions of this court. In Atlantic & Pacific Tel. Co. *v.* Philadelphia, 190 U. S. 160, the court stated as a proposition so often adjudicated as to be no longer open to discussion that " the franchise of a corporation, although that franchise is the business of interstate commerce, is, as a part of its property, subject to state taxation, provided at least the franchise is not derived from the United States."

See also Horn Silver Mining Co. *v.* New York, 143 U. S. 305.
Postal Telegraph Cable Co. *v.* Adams, 155 U. S. 688, 696.

The objection to a tax on credits due from residents to non-residents may be based upon the contention either that intangible property is not subject to the foregoing rule or that a tax on such credits is

in violation of the Fourteenth Amendment. As to the second point it is submitted that the petitioner is concluded by numerous decisions sustaining state taxation of credits due to non-residents.

New Orleans *v.* Stempel, 175 U. S. 309, 320, *et seq.*
Bristol *v.* Washington County, 177 U. S. 133, 145.
Board of Assessors *v.* Comptoir National D'Escompte, 191 U. S. 388.
Metropolitan Life Ins. Co. of New York *v.* New Orleans, 205 U. S. 395.
Liverpool, etc., Ins. Co. *v.* Orleans Assessors, 221 U. S. 346, 354.
Shaffer *v.* Carter, 252 U. S. 37, 52.

The fact that such credits arise from and are used exclusively in interstate commerce, it is submitted, makes no difference. The rule with respect to the taxation of property used in interstate commerce does not distinguish between tangible and intangible property. The validity of the tax does not depend on the connection of the property with some local business but on the remoteness of any burden or effect upon interstate commerce.

See Western Union Telegraph Co. *v.* Massachusetts, 125 U. S. 530.
Postal Telegraph Cable Co. *v.* Adams, 155 U. S. 688.
Adams Express Co. *v.* Ohio State Auditor, 165 U. S. 194, 222.

Cudahy Packing Co. *v.* Minnesota, 246 U. S. 450, 456.
Pullman Co. *v.* Richardson, 261 U. S. 330.

If a tax on tangible and intangible assets including the corporate franchise of a foreign corporation employed in a State, although employed exclusively in interstate commerce, is valid, an excise tax measured by such property should also be valid. A tax measured by property may be valid when a tax on the property itself would be invalid, as the court stated in Flint *v.* Stone Tracy Co., 220 U. S. 107, 165, and again in Baltic Mining Co. *v.* Massachusetts, 231 U. S. 68, 87; but the converse is not true. This court has on several occasions held that such a tax is in effect a tax on property and therefore in no respect repugnant to the Federal Constitution.

In Western Union Telegraph Co. *v.* Massachusetts, 125 U. S. 530, 552, a statute imposed a tax on the plaintiff measured by a portion of the fair cash value of its capital stock proportional to the ratio of the length of its lines in Massachusetts to the length of all its lines, less the value of its real estate and machinery subject to local taxation within the State. The court held that the tax was an excise measured by property within the Commonwealth, and was valid. On this point the court said:

"The tax in the present case, though nominally upon the shares of the capital stock of the company, is in effect a tax upon that organization on account of property owned and used by it in the State of Massachusetts, and the proportion of the length of its lines in that State to their entire length throughout the country is made the basis for ascertaining the value of that property.

In Pullman's Palace Car Co. *v.* Pennsylvania, 141 U. S. 18, 25, a tax assessed upon such proportion of the company's capital stock as the number of miles of railroad over which its cars were run in the State bore to the whole number of miles was held to be valid as in effect a tax on the plaintiff's property within the State. The court said in the opinion:

"The tax now in question is not a license tax or a privilege tax; it is not a tax on business or occupation. The tax is imposed equally on corporations doing business within the State, whether domestic or foreign, and whether engaged in interstate commerce or not. The tax on the capital of the corporation, on account of its property within the State is, in substance and effect, a tax on that property."

In Postal Telegraph Cable Co. *v.* Adams, 155 U. S. 688, 696, 698, 700, the court said:

"But property in a State belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax may be imposed on the corporation on account of its property within a State, and may take the form of a tax for the privilege of exercising its franchises within the State, if the ascertainment of the amount is made dependent in fact on the value of its property situated within the State, (the exaction, therefore, not being susceptible of exceeding the sum which might be leviable directly thereon,) and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes. The corporation is thus made to bear its proper proportion of the burdens of the government under whose protection it conducts its operations, while interstate commerce is not in itself subjected to restraint or impediment.

. . . . . .

. . . Being thus brought within the rule, the tax becomes substantially a mere tax on property and not one imposed on the privilege of doing interstate business. The substance and not the shadow determines the validity of the exercise of the power.

. . . . . .

In the case before us, the tax was graduated according to the amount and value of the property measured by miles, and was in lieu of taxes levied directly on the property. In marking the distinction between the power over commerce and municipal power, literal adherence to particular nomenclature should not be allowed to control construction in arriving at the true intention and effect of state legislation."

See also United States Express Co. *v.* Minnesota, 223 U. S. 335.
Cudahy Packing Co. *v.* Minnesota, 246 U. S. 450.
Pullman Co. *v.* Richardson, 261 U. S. 330.
12 California Law Review, 39–44.

In the opinion in No. 327 of 1923 the state court said on this point:

"The former decision rested in its ultimate analysis upon the theory that under the statute the excise might be measured in part upon intangible assets of the petitioner having a situs in this Commonwealth and arising exclusively from the conduct of its interstate business. We understand that credits due from residents within this Commonwealth to non-residents may be made the subject of direct property taxation here. . . . The source from which such credits arise is not material. They are not immune from taxation because coming into existence through the transaction of interstate commerce. That being so it would seem that such credits may be used as

a measure of an excise levied indifferently upon all corporations under a general law."

Accordingly it is submitted that the first part of the tax, measured by the value of the corporate excess employed within the Commonwealth and making no discrimination against foreign corporations or interstate commerce, as applied to a foreign corporation engaged exclusively in interstate commerce, is constitutional and valid.

B.

The Tax, so far as Measured by Net Income derived from Business within the Commonwealth, is valid as to Foreign Corporations Engaged Solely in Interstate Commerce.

That part of the tax imposed on a foreign corporation by G. L., c. 63, which is measured by the part of its net income derived from business carried on within the Commonwealth is wholly different from any corporation excise tax imposed by Massachusetts laws prior to the statute of 1918. It is a tax measured by net income from business transacted in Massachusetts which, although derived in the present instance solely from interstate commerce, is laid without discrimination against foreign corporations or against interstate commerce. Net income from business in Massachusetts is used as a measure applicable to all corporations alike.

The record shows that the petitioner received annual gross receipts from business done in Massachusetts amounting to $424,982.70 in 1920 and $343,-

204.60 in 1921. The amount of the net income earned from that business in those respective years was determined by the Commissioner according to the statutory rule to be $15,370.06 in 1920 and $9,202.53 in 1921.

The petitioner's contention as to this branch of the tax is that a tax on or measured by net income is invalid where that income is earned exclusively in interstate commerce, although the basis of the tax is income earned within the State, because it constitutes a direct burden on such commerce, and because when levied on a foreign corporation it violates the provisions of the Fourteenth Amendment.

As to the latter contention little needs to be said. The petitioner, it is submitted, is plainly concluded by decisions of this court holding that the income of a non-resident is subject to taxation within the State where it was earned or accrued.

> Shaffer *v.* Carter, 252 U. S. 37.
> Travis *v.* Yale & Towne Manuf. Co., 252 U. S. 60.

Consideration of the other proposition, namely, that such a tax constitutes a direct interference with interstate commerce and is therefore unconstitutional, requires some examination of recent decisions of this court. These decisions when analyzed, it is submitted, will show that a distinction is to be made between taxes on or measured by gross receipts and taxes on or measured by net income, and that taxes of the latter sort measured by net income earned within the State, where there is no discrimination

against and no obstruction of interstate commerce, are valid, although the income is derived from interstate commerce, because it is thought that such commerce is affected only indirectly and remotely by such a tax. The following decisions should be reviewed in this connection:

Peck & Co. *v.* Lowe, 247 U. S. 165, 174, 175.
United States Glue Co. *v.* Oak Creek, 247 U. S. 321, 326–329.
Shaffer *v.* Carter, 252 U. S. 37, 57.
Underwood Typewriter Co. *v.* Chamberlain, 254 U. S. 113, 119, 120.
Atlantic Coast Line *v.* Daughton, 262 U. S. 413, 416, 420.

In Peck & Co. *v.* Lowe the plaintiff was a domestic corporation chiefly engaged in buying goods in the several States, shipping them to foreign countries and there selling them. A Federal income tax was levied under the act of October 3, 1913, on its total net income. The question in controversy was concerning the validity of so much of the tax as was based on the income from foreign commerce. The court held that the tax was valid. Their reasons, as stated in the opinion, were as follows:

"The tax in question is unlike any of those heretofore condemned. It is not laid on articles in course of exportation or on anything which inherently or by the usages of commerce is embraced in exportation or any of its processes. On the contrary, it is an income tax laid generally on net incomes. And while it cannot be applied to any income which Congress has no power to tax (see Stanton *v.* Baltic Mining

Co., *supra*, p. 113), it is both nominally and actually a general tax. It is not laid on income from exportation because of its source, or in a discriminative way, but just as it is laid on other income. The words of the act are 'net income arising or accruing from all sources.' There is no discrimination. At most, exportation is affected only indirectly and remotely. The tax is levied after exportation is completed, after all expenses are paid and losses adjusted, and after the recipient of the income is free to use it as he chooses. Thus what is taxed — the net income — is as far removed from exportation as are articles intended for export before the exportation begins. If articles manufactured and intended for export are subject to taxation under general laws up to the time they are put in course of exportation, as we have seen they are, the conclusion is unavoidable that the net income from the venture when completed, that is to say, after the exportation and sale are fully consummated, is likewise subject to taxation under general laws. In that respect the status of the income is not different from that of the exported articles prior to the exportation."

In United States Glue Co. *v.* Oak Creek the plaintiff was a domestic corporation in the State of Wisconsin engaged in manufacturing and selling its product throughout the state and in other states and foreign countries. A tax was imposed upon its net income under the Wisconsin income tax law. The question considered by the court was " whether a State, in levying a general income tax upon the gains and profits of a domestic corporation, may include in the computation the net income derived from transactions in interstate commerce without contravening the commerce clause of the Constitution of the United States." The court sustained the tax on the ground that a tax on, or measured by, net income,

like a tax on property, where the net income is derived from interstate commerce or the property is engaged in interstate commerce, does not, where there is no discrimination, directly burden interstate commerce.

The reasons given by the court are quoted at length:

"It is settled that a State may not directly burden interstate commerce, either by taxation or otherwise. But a tax that only indirectly affects the profits or returns from such commerce is not within the rule. . . .

. . . . . .

The correct line of distinction is so well illustrated in two cases decided at the present term that we hardly need go further. In Crew Levick Co. *v.* Pennsylvania, 245 U. S. 292, we held that a state tax upon the business of selling goods in foreign commerce, measured by a certain percentage of the gross transactions in such commerce, was by its necessary effect a tax upon the commerce, and at the same time a duty upon exports, contrary to §§ 8 and 10 of Article I of the Constitution, since it operated to lay a direct burden upon every transaction by withholding for the use of the State a part of every dollar received. On the other hand, in Peck & Co. *v.* Lowe, *ante*, 165, we held that the Income Tax Act of October 3, 1913, c. 16, § 2, 38 Stat. 166, 172, when carried into effect by imposing an assessment upon the entire net income of a corporation, approximately three-fourths of which was derived from the export of goods to foreign countries, did not amount to laying a tax or duty on articles exported within the meaning of Art. I, § 9, cl. 5 of the Constitution. The distinction between a direct and an indirect burden by way of tax or duty was developed, and it was shown that an income tax laid generally on net incomes, not on income from exportation because of its source or in the way of discrimination, but just as it was

laid on other income, and affecting only the net receipts from exportation after all expenses were paid and losses adjusted and the recipient of the income was free to use it as he chose, was only an indirect burden.

The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large. Such a tax, when imposed upon net incomes from whatever source arising, is but a method of distributing the cost of government, like a tax upon property, or upon franchises treated as property; and if there be no discrimination against interstate commerce, either in the admeasurement of the tax or in the means adopted for enforcing it, it constitutes one of the ordinary and general burdens of government, from which persons and corporations otherwise subject to the jurisdiction of the States are not exempted by the Federal constitution because they happen to be engaged in commerce among the States."

In Shaffer *v.* Carter the plaintiff, a citizen and resident of Illinois, was engaged in the oil business in Oklahoma, having purchased, owned, developed and operated a number of oil and gas mining leases and being the owner in fee of certain oil producing land in that state. From the properties thus owned

and operated he received a net income on which he was assessed an income tax, which the defendant was proceeding to collect. The court held that the tax was constitutional. Replying to the argument that it constituted a burden on interstate commerce, the court said:

"It is urged that, regarding the tax as imposed upon the business conducted within the State, it amounts in the case of appellant's business to a burden upon interstate commerce, because the products of his oil operations are shipped out of the State. Assuming that it fairly appears that his method of business constitutes interstate commerce, it is sufficient to say that the tax is imposed not upon the gross receipts, as in Crew Levick Co. *v.* Pennsylvania, 245 U. S. 292, but only upon the net proceeds, and is plainly sustainable even if it includes net gains from interstate commerce. U. S. Glue Co. *v.* Oak Creek, 247 U. S. 321. Compare Peck & Co. *v.* Lowe, 247 U. S. 165."

In Underwood Typewriter Co. *v.* Chamberlain the plaintiff, a Delaware corporation, sued to recover the amount of a tax assessed upon it by the State of Connecticut. The tax was assessed upon the net income earned during the preceding year from business carried on within the state under a law providing for the apportionment of the total net income by a fixed rule. The plaintiff was engaged in the business of manufacturing typewriters and selling its products. Its main office was in New York City and all its manufacturing was done in Connecticut. With respect to the contention that the tax burdened interstate commerce and was therefore void under U. S. Const., Art. I, § 8, the court said as follows:

"Payment of the tax is not made a condition precedent to the right of the corporation to carry on business, including interstate business. Its enforcement is left to the ordinary means of collecting taxes. St. Louis Southwestern Ry. Co. *v.* Arkansas, 235 U. S. 350, 364; Atlantic & Pacific Telegraph Co. *v.* Philadelphia, 190 U. S. 160, 163. The statute is, therefore, not open to the objection that it compels the company to pay for the privilege of engaging in interstate commerce. A tax is not obnoxious to the commerce clause merely because imposed upon property used in interstate commerce, even if it takes the form of a tax for the privilege of exercising its franchise within the State. Postal Telegraph Cable Co. *v.* Adams, 155 U. S. 688, 695. This tax is based upon the net profits earned within the State. That a tax measured by net profits is valid, although these profits may have been derived in part, or indeed mainly, from interstate commerce, is settled. U. S. Glue Co. *v.* Oak Creek, 247 U. S. 321; Shaffer *v.* Carter, 252 U. S. 37, 57. Compare Peck & Co. *v.* Lowe, 247 U. S. 165. Whether it be deemed a property tax or a franchise tax, it is not obnoxious to the commerce clause."

In Atlantic Coast Line *v.* Daughton the plaintiffs were interstate carriers each owning and operating a line of railroad within the State of North Carolina. Taxes were levied by the State under its law upon net income earned within the State. It was conceded by the plaintiffs that taxation of the net income of an interstate carrier does not violate the commerce clause, their contentions being that in fact gross income was taxed and unreasonable classifications were made by the statute. The court said in the opinion:

"That a State may, consistently with the Federal Constitution, impose a tax upon the net income of property, as dis-

tinguished from the net income of him who owns or operates it, although the property is used in interstate commerce, was settled in Shaffer *v.* Carter, 252 U. S. 37, 44, 52."

See also Schwab *v.* Richardson, U. S. Sup. Ct., decided November 12, 1923.

In the light of these decisions there can now be no doubt that foreign corporations may be taxed by a State if the tax is measured by the net income earned by the corporation within the State, and is laid without discrimination or direct interference with interstate commerce, although such income is *partly* derived from interstate commerce. The question is whether the rule is different where *all* the income earned within the State is derived from that source.

This question seems to be already settled by authority. While in the Underwood Typewriter case the court, in stating the result of the decisions, went no further than to say " that a tax measured by net profits is valid, although these profits may have been derived *in part,* or indeed *mainly,* from interstate commerce, is settled," yet in Shaffer *v.* Carter the case seems to have been one where, on the court's assumption that the plaintiff's method of business constituted interstate commerce, his income was all derived from that business and was therefore wholly derived from interstate commerce. It was said by Mr. Justice Brandeis dissenting, in Texas Transport & Terminal Co. *v.* New Orleans, U. S. Sup. Ct., February 18, 1924:

"It is settled law that interstate commerce is not directly burdened by a tax imposed upon property used exclusively in

interstate commerce . . .; or by a tax upon net income derived exclusively from interstate commerce, United States Glue Co. v. Oak Creek, 247 U. S. 321; Shaffer v. Carter, 252 U. S. 37, 57; compare Peck & Co. v. Lowe, 247 U. S. 165."

See also 32 Harvard Law Review, 634–640, 646–649.
12 California Law Review, 39–44.
Cf. Knowlton *v.* Moore, 178 U. S. 41, 59.

The ground of decision in the cases referred to affords no basis for a distinction with respect to the validity of a tax measured by net income as between foreign corporations deriving their income *mainly* from interstate commerce and those deriving their income *solely* from that source. In that respect the cases differ fundamentally from other cases where the validity of certain taxes measured by the capital stock or gross receipts of foreign corporations was in question and those taxes were held to be valid only if they might reasonably be regarded as taxes on, or license fees for, the privilege of doing a local business as distinguished from interstate commerce. In the cases dealing with taxes on or measured by net income the court do not apply that test. They do not say the tax is valid as a tax on the privilege of doing a local business. They hold rather that net income from business within the State, even if that business is interstate commerce, is so indirectly related to interstate commerce that a tax on or measured by such income does not directly burden interstate commerce, so long as there is no discrimination in its imposition or enforcement. The burden is indirect just as in the case of a tax on property

where there is no discrimination, though in a given instance the property tax may be employed solely in interstate commerce. This is exemplified in the cases already cited.

United States Glue Co. *v.* Oak Creek, 247 U. S. 321, 329:

"Such a tax, when imposed upon net incomes from whatever source arising, is but a method of distributing the cost of government, like a tax upon property, or upon franchises treated as property."

The fact that the tax is not laid directly on net income, but, with respect to this feature of the tax, is an excise measured by net income, makes no difference. As we have shown, if a tax on property is valid a tax measured by the value of such property will also be valid. This is equally true, as the court has held, with respect to net income.

Underwood Typewriter Co. *v.* Chamberlain, 254 U. S. 113, 120:

"We may lay on one side the question whether this is an excise tax purporting to be measured by the income accruing from business within the State or a direct tax upon that income; for the 'argument, upon analysis, resolves itself into a mere question of definitions, and has no legitimate bearing upon any question raised under the Federal Constitution'. Shaffer *v.* Carter, 252 U. S. 37, 55."

See also 12 California Law Review, 43.

The discussion under this heading is equally applicable to the tax assessed under St. 1921, c. 493, since that is a tax measured by net income apportioned to the Commonwealth.

With respect to the taxes in suit, so far as concerns that part which is measured by net income from Massachusetts business, it appears that they are reasonable and fair, are not discriminatory, and do not unduly burden interstate commerce. It is submitted that for the reasons stated that part of the tax which is measured by net income from business within the Commonwealth, as applied to a foreign corporation engaged exclusively in interstate commerce, is constitutional and valid.

Taking the taxes as a whole, it will be found that they are measured wholly by property and income used or earned in Massachusetts. Payment is not required as a prerequisite to doing business, and enforcement is left to the ordinary means of collecting taxes. Corporations, even although engaged exclusively in interstate commerce, should not be permitted entirely to escape taxation by the States in which they do business but should be required to make fair contribution to the support of the government the benefits of whose protection they enjoy. "Corporations and companies engaged in interstate commerce should bear their proper proportion of the burdens of the government under whose protection they conduct their operations," Adams Express Co. *v.* Ohio State Auditor, 165 U. S. 194, 220. To hold these taxes invalid with respect to foreign corporations engaged exclusively in interstate commerce and valid with respect to foreign corporations having a modicum of local business would confer a special benefit on the former class at the expense of the latter, which might work a considerable hardship against corporations which are competitors of those

so favored. As the state court said in the opinion in No. 327 of 1924:

"The tax considered as a whole with both its main factors is general in nature and reasonable in amount. The tax upon the petitioner in substance and effect, so far as concerns the factor of its corporate excess employed within the Commonwealth, is levied upon its tangible personal property within the Commonwealth, upon the credits due it from debtors within this Commonwealth, and upon the exercise of its franchise within this Commonwealth, and, so far as concerns the factor of its income, upon the net income derived from business in this Commonwealth after all losses and expenses have been paid. It is not directed against interstate commerce or property outside the State but is confined to business done, property located, capital employed and net income earned within the Commonwealth. It affects interstate commerce indirectly and is not an immediate burden upon it. It affords to the State only a fair and reasonable revenue for the maintenance of the government, the benefits from the protection of which the petitioner enjoys."

III.

THE TAXES ASSESSED WERE MEASURED BY THE VALUE OF PROPERTY USED AND NET INCOME EARNED WITHIN THE COMMONWEALTH.

The argument under the preceding heading proceeded on the assumption that the taxes in controversy were computed and assessed, in accordance with the provisions of G. L., c. 63, § 39, and St. 1921, c. 493, in amounts equal to the required percentages of the value of property employed within the Commonwealth and of net income derived from business

carried on within the Commonwealth. It remains to show that this assumption was justified.

In assessing the 1921 and 1922 taxes under G. L., c. 63, the Commissioner was required to compute two amounts, —

"(1) An amount equal to five dollars per thousand upon the value of the corporate excess employed by it within the commonwealth.

"(2) An amount equal to two and one half per cent of that part of its net income . . . which is derived from business carried on within the commonwealth."

A statutory rule for determining "corporate excess employed within the Commonwealth" by a foreign corporation is given by G. L., c. 63, § 30, cl. 4, which is in substance that the proportion of the value of the assets, real and personal, employed in business within the Commonwealth on a particular date to the value of the total assets is to be multiplied by the fair cash value of all the shares of capital stock on that date, and from the product the value of real estate and machinery locally taxed and certain securities is to be deducted. As we have already shown, the result of the application of this rule, before making the deductions, should be an amount precisely equal to, and not an estimate or approximation of, the value of the real and personal assets of a foreign corporation, as part of a going concern, employed in business within the Commonwealth. It is settled that a tax may be laid on or measured by such value.

Pullman Co. *v.* Richardson, 261 U. S. 330, 338, 339.

In determining the value of the "corporate excess employed within the Commonwealth" it was necessary for the Commissioner to find the value of the assets employed in business within the Commonwealth. The value of the tangible assets so employed was given but the value of the intangible assets so employed was not given. The Commissioner accordingly proceeded to value those assets in accordance with a method prescribed by his general ruling, by taking a proportion of the total value of the intangible assets equal to the proportion of the remainder of net income allocable to Massachusetts by the statutory rule prescribed by G. L., c. 63, §§ 41 and 38, to the total of such remainder. Such determination it is submitted is justifiable for two reasons.

1. Assuming that the result of the allocating method prescribed by the statute fairly represented net income allocable to the Commonwealth, it is submitted that the same proportion of the intangible assets might fairly be allocated to the Commonwealth as employed within the Commonwealth, on the assumption that the intangible assets wherever situated contributed equally to the production of net income. Methods of apportionment apparently open to more serious criticism have been upheld and approved by this court.

Western Union Telegraph Co. *v.* Massachusetts, 125 U. S. 530, 552, 553.

Pullman's Palace Car Co. *v.* Pennsylvania, 141 U. S. 18, 26.

Pittsburg, etc., Ry. Co. *v.* Backus, 154 U. S. 421, 430–432.

Adams Express Co. *v.* Ohio State Auditor, 165 U. S. 194.
St. Louis Southwestern Ry Co. *v.* Arkansas, 235 U. S. 350, 365.
Underwood Typewriter Co. *v.* Chamberlain, 254 U. S. 113, 120, 121.

The method followed in Wallace *v.* Hines, 253 U. S. 66, was disapproved because in its particular application it was found to be unfair.

2. Under the Commissioner's general ruling the petitioner was given an opportunity, if the allocating method did not fairly reflect the proportion of the intangible assets employed in business in Massachusetts, to request determination by another method. The petitioner failed to avail itself of this privilege. It made no such request at any time. Therefore, it is submitted, it cannot now be heard to complain that the method employed was not fair and equitable.

In determining the net income derived from business within the Commonwealth the Commissioner proceeded in accordance with the statutory rule contained in G. L., c. 63, §§ 41 and 38. This rule requires the allocation first of gains from the sale of capital assets and certain kinds of interest, and, in the case of a foreign corporation carrying on any business outside the Commonwealth, the allocation of the remainder of net income by dividing it into three equal parts, one of which is to be multiplied by each of the following three ratios:

(*a*) The value of the tangible property in Massachusetts to the total value,

(*b*) Expenditure for wages and salaries assignable to Massachusetts to the total expenditure,

(*c*) Gross receipts from business assignable to Massachusetts to the total gross receipts,

and the deduction from the net income so allocated of an allowance for the value of machinery used in Massachusetts.

The amounts determined by the Commissioner for 1921 and 1922 respectively were calculated from figures furnished by the petitioner and shown by its return. Furthermore calculations were made in the returns themselves showing the amounts of net income derived from business in Massachusetts, which in the case of the 1922 tax were accepted by the Commissioner and in the case of the 1921 tax were accepted with some corrections. As to these corrections the respondent relies on the stipulation appearing in the record, as follows: "The amount of the tax assessed is not questioned, but may be referred to as bearing on the questions of law presented. No question of valuation is involved."

The method used by the Commissioner in allocating net income it is submitted is justifiable for two reasons corresponding to the two reasons applicable to the determination of the other part of the taxes.

1. The aim of the statute is to reach only net income earned within the State. Clearly net profits earned in Massachusetts could not be assigned specifically. The Legislature therefore sought to accomplish its object by taking into account different elements which enter into business done in Massa-

chusetts as compared with the whole of those elements. The three elements, inversely, are gross receipts, expenditure for wages and salaries, and value of tangible property. Obviously in this way a proportion is obtained which will more fairly represent net income attributable to Massachusetts than a proportion taken from any single element would produce. Doubtless the three elements named were selected because they could be more readily apportioned. The tax is not laid upon or measured by those elements directly. They are only used in combination to produce a fair approximation to net income attributable to Massachusetts as applied to foreign corporations generally. They produced such a result in the instant case. As the state court said:

"It seems to us that the question in this connection is not whether a subsidiary percentage standing alone may impinge upon property outside the Commonwealth, but whether the use of all the percentages makes the final result a tax which violates constitutional guarantees. The several percentages are not taxes levied upon the terms employed. They are used in combination to ascertain a sum which in amount as applied to all corporations may be reasonable. . . . The aim of the statute in this particular is to reach only profits earned within the State. The total net income for the year was $1,148,041.70, of which $15,370.06 was allocated to Massachusetts. The gross receipts assignable to Massachusetts, according to the petitioner's return, were $424,982.70, out of a total of $12,774,825.05. The facts do not appear to us to show that the proportion of net income ultimately allocated to this Commonwealth was in excess of the just amount."

Methods of apportionment certainly no less objectionable have been approved by this court.

Underwood Typewriter Co. *v.* Chamberlain, 254 U. S. 113, 120, 121.
Atlantic Coast Line *v.* Daughton, 262 U. S. 413.

Measuring the value of property by gross receipts within the State alone has been held to be proper.

Maine *v.* Grand Trunk Ry. Co., 142 U. S. 217.
United States Express Co. *v.* Minnesota, 223 U. S. 335.
Cudahy Packing Co. *v.* Minnesota, 246 U. S. 450.
Pullman Co. *v.* Richardson, 261 U. S. 330.

2. A second sufficient reason for upholding the Commissioner's determination of the amount of net income attributable to Massachusetts business is that the statute (G. L., c. 63, § 42) gives to a foreign corporation the right to refuse to accept determination of the amount of such net income by the allocating method, and to have the amount determined from information furnished by the corporation, and that the petitioner made no such request. For that reason, it is submitted, this court is bound to assume that the amount as determined by the Commissioner fairly represents the amount of net income derived from Massachusetts business.

It does not appear by what method the Commissioner fixed the amount of net income apportioned to the Commonwealth under St. 1921, c. 493, imposing an excise tax of a percentage of such net

income. The amount of that net income as fixed by the Commissioner ($52.63) and the amount of that tax ($0.39) make further discussion of the point unnecessary.

It is submitted that the taxes which the petitioner seeks to recover were in all respects valid.

Respectfully submitted,

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APPENDIX.

MASSACHUSETTS STATUTES.

Acts of 1903, Chapter 437.

"Section 75. Every foreign corporation of the classes described in section fifty-eight shall, in each year, at the time of filing its annual certificate of condition, pay to the treasurer and receiver general, for the use of the commonwealth, an excise tax to be assessed by the tax commissioner of one hundredth of one per cent of the par value of its authorized capital stock as stated in its annual certificate of condition; but it may deduct from such tax the amount of taxes upon property paid by it to any city or town in the commonwealth during the preceding year, and the amount of such excise tax shall not in any one year exceed the sum of two thousand dollars."

Acts of 1909, Chapter 490, Part III.

"Section 54. Every foreign corporation shall annually, within thirty days after the date fixed for its annual meeting, or within thirty days after the final adjournment of said meeting, but not more than three months after the date so fixed for said meeting, prepare and file in the office of the secretary of the commonwealth, upon payment of the fee provided in section ninety-one of chapter four hundred and thirty-seven of the acts of the year nineteen hundred and three, a certificate signed and sworn to by its president, treasurer, and by a majority of its board of directors, showing the amount of its authorized capital stock, and its assets and liabilities as of a date not more than ninety days prior to said annual meeting, in such form as is required of domestic business corporations under the provisions of section forty-five of said chapter, and the change or changes, if any, in the other particulars included in the certificate required by section sixty of said chap-

ter, made since the filing of said certificate or of the last annual report.

. . . . . .

Section 56. Every foreign corporation shall, in each year, at the time of filing its annual certificate of condition, pay to the treasurer and receiver general, for the use of the commonwealth, an excise tax to be assessed by the tax commissioner of one fiftieth of one per cent of the par value of its authorized capital stock as stated in its annual certificate of condition; but the amount of such excise tax shall not in any one year exceed the sum of two thousand dollars."

Acts of 1914, Chapter 724.

"Section 1. Every foreign corporation subject to the tax imposed by section fifty-six of Part III of chapter four hundred and ninety of the acts of the year nineteen hundred and nine shall in each year, at the time of filing its annual certificate of condition, pay to the treasurer and receiver general for the use of the commonwealth, in addition to the tax imposed by said section fifty-six, an excise tax to be assessed by the tax commissioner of one one hundredth of one per cent of the par value of its authorized capital stock in excess of ten million dollars as stated in its annual certificate of condition.

Section 2. All laws now or hereafter in force relating to the assessment and collection of the tax imposed by said section fifty-six and all laws providing for appeal from any assessment made under said section fifty-six or for the recovery of any tax assessed thereunder shall, except so far as they are inconsistent with the provisions of this act, apply to the tax imposed by this act."

General Laws, Chapter 59.

"Section 5. The following property and polls shall be exempt from taxation:

. . . . . .

Sixteenth, Property, other than real estate, and other than machinery used in manufacture or in supplying or distributing water, owned by Massachusetts savings banks or co-operative banks, by Massachusetts corporations subject to taxation under chapter sixty-three or by foreign corporations subject to taxation under section thirty-nine or fifty-eight of said chapter."

GENERAL LAWS, CHAPTER 63.

"SECTION 30. When used in this section and sections thirty-one to fifty-two, inclusive, the following terms shall have the following meanings:

1. 'Domestic business corporation', every corporation organized under or subject to chapter one hundred and fifty-six.

2. 'Foreign corporation', every corporation, association or organization established, organized or chartered under laws other than those of the commonwealth, for purposes for which domestic corporations may be organized under chapter one hundred and fifty-six, which has a usual place of business in this commonwealth, or is engaged here, permanently or temporarily, in the construction, erection, alteration or repair of a building, bridge, railroad, railway or structure of any kind.

3. 'Corporate excess', in the case of a domestic business corporation, the fair cash value of all the shares constituting the capital stock of a corporation on the first day of April when the return called for by section thirty-five is due, less the value of the following:

(*a*) The works, structures, real estate, machinery, poles, underground conduits, wires and pipes owned by it within the commonwealth subject to local taxation, except such part of said real estate as represents the interest of a mortgagee.

(*b*) Securities, the income of which, if any, if received by a natural person resident in this commonwealth, would not be liable to taxation, except shares in national banks and voluntary associations, trusts and partnerships.

. . . . . .

SECTION 32. Except as otherwise provided in sections thirty-three and thirty-four, every domestic business corpora-

For balance of Section 30 see Rec. No. 103, pp. 31, 32.

tion shall pay annually, with respect to the carrying on or doing of business by it, an excise equal to the sum of the following, provided that every such corporation shall pay annually a total excise not less in amount than one twentieth of one per cent of the fair cash value of all the shares constituting its capital stock on the first day of April when the return called for by section thirty-five is due:

(1) An amount equal to five dollars per thousand upon the value of its corporate excess.

(2) An amount equal to two and one half per cent of that part of its net income, as defined in this chapter, which is derived from business carried on within the commonwealth.

. . . . . .

SECTION 38. Income of the classes described in the preceding section having been allocated, the remainder of the net income as defined in section thirty shall be allocated as follows:

1. If the corporation carries on no business outside the commonwealth, the whole of said remainder shall be allocated to this commonwealth.

2. If the corporation carries on any business outside the commonwealth, the said remainder shall be divided into three equal parts:

(*a*) Of one third, such portion shall be attributed to business carried on within the commonwealth as shall be found by multiplying said third by a fraction whose numerator is the value of the corporation's tangible property situated within the commonwealth and whose denominator is the value of all the corporation's tangible property wherever situated.

(*b*) Of another third, such portion shall be attributed to business carried on within the commonwealth as shall be found by multiplying said third by a fraction whose numerator is the expenditure of the corporation for wages, salaries, commissions or other compensation to its employees, and assignable to this commonwealth as hereinafter provided, and whose denominator is the total expenditure of the corporation for wages,

salaries, commissions or other compensation to all its employees.

(c) Of the remaining third, such portion shall be attributed to business carried on within the commonwealth as shall be found by multiplying said third by a fraction whose numerator is the amount of the corporation's gross receipts from business assignable to this commonwealth as hereinafter provided, and whose denominator is the amount of the corporation's gross receipts from all its business.

3. In a case where only two of the foregoing three rules are applicable, the said remainder of net income of the corporation shall be divided into two equal parts only, each of which shall be apportioned in accordance with one of the remaining two rules. If only one of the three rules is applicable, the part of the net income received from business carried on within the commonwealth shall be determined solely by that rule.

4. The value of the corporation's tangible property for the purposes of this section shall be the average value of such property during the taxable year.

5. The amount assignable to this commonwealth of expenditure of the corporation for wages, salaries, commissions or other compensation to its employees shall be such expenditure for the taxable year as represents the compensation of employees not chiefly situated at, connected with or sent out from premises for the transaction of business owned or rented by the corporation outside the commonwealth.

6. The amount of the corporation's gross receipts from business assignable to this commonwealth shall be the amount of its gross receipts for the taxable year from (a) sales, except those negotiated or effected in behalf of the corporation by agents or agencies chiefly situated at, connected with or sent out from premises for the transaction of business owned or rented by the corporation outside the commonwealth and sales otherwise determined by the commissioner to be attributable to the business conducted on such premises, (b) rentals or

royalties from property situated, or from the use of patents, within the commonwealth; provided, that upon application by a corporation which owns or controls substantially all the capital stock of another corporation, or by the corporation so owned or controlled, the commissioner may impose the tax provided for by this chapter upon the income of the two corporations jointly in the same manner as though they were a single corporation, or may, in such other manner as he shall determine, equitably adjust the tax of the applying corporation.

7. If a corporation maintains an office, warehouse or other place of business in a state other than this commonwealth for the purpose of reducing its tax under this chapter, the commissioner shall, in determining the amount of its gross receipts from business assignable to this commonwealth, include therein the gross receipts from sales attributed by the corporation to the business conducted at such place of business in another state.

8. In the case of consolidated returns of net income, the commissioner shall allocate such income, so far as practicable, in accordance with the above rules.

9. A rule shall not be deemed to be inapplicable merely because all the tangible property or the expenditure of a corporation for wages, salaries, commissions or other compensation, or the gross receipts of the corporation, are found to be situated, incurred, or received without the commonwealth.

10. From the net income allocated to this commonwealth there shall be deducted the same proportion thereof which the fair cash value of machinery owned by the corporation and used in manufacturing in the commonwealth bears to its total assets employed therein, and the amount remaining shall be its net income subject to tax under this chapter.

SECTION 39. Every foreign corporation shall pay annually, with respect to the carrying on or doing of business by it within the commonwealth, an excise equal to the sum of the following, provided that every such corporation shall pay annually a total excise not less in amount than one twentieth of

one per cent of such proportion of the fair cash value of all the shares constituting its capital stock as the assets, both real and personal, employed in any business within the commonwealth on April first following the close of the taxable year, bear to the total assets of the corporation employed in business on said date:

(1) An amount equal to five dollars per thousand upon the value of the corporate excess employed by it within the commonwealth.

(2) An amount equal to two and one half per cent of that part of its net income, as defined in section thirty and in this section, which is derived from business carried on within the commonwealth.

If two or more foreign corporations doing business in this commonwealth participated in the filing of a consolidated return of income to the federal government, the tax under paragraph (2) above may, at their option, be assessed upon their combined net income, in which case the tax shall be assessed to all said corporations and collected from any one or more of them. Foreign corporations thus affiliated and doing business in this commonwealth, which do not elect, under the foregoing provision, to be assessed upon their combined net income, and all other foreign corporations doing business in this commonwealth, which have filed with one or more corporations not subject to this section a consolidated return of net income to the federal government, shall each file with the commissioner, as a part of the return required by this chapter, a statement of net income in such form as he may prescribe, showing the gross income and deductions in accordance with the law and regulations governing the usual federal returns of corporations not thus affiliated; and the net income thus shown, after making deductions therefrom and additions thereto as provided in paragraph five of section thirty, shall be the 'net income' under this chapter.

SECTION 40. Every foreign corporation shall make returns as provided in sections thirty-five and thirty-six; and all pro-

visions of said sections shall apply to such corporations, except that the term 'corporate excess' in said section thirty-five shall, in the case of a foreign corporation, mean the corporate excess employed by it within the commonwealth.

SECTION 41. The commissioner shall determine in the manner provided in this section the part of the net income of a foreign corporation derived from business carried on within the commonwealth.

The following classes of income shall be allocated as follows:

(*a*) Gains realized from the sale of capital assets, if such assets consist of real estate or tangible personal property situated in the commonwealth, shall be allocated to this commonwealth.

(*b*) Interest received from any corporation organized under the laws of the commonwealth or from any association, partnership or trust having transferable shares and having its principal place of business in the commonwealth, or from any inhabitant of the commonwealth, except interest received on deposits in trust companies or in national banks doing business in the commonwealth, shall be allocated to this commonwealth.

(*c*) Gains realized from the sale of capital assets other than those named in paragraph (*a*) above shall not be allocated in any part to this commonwealth.

Income of the foregoing classes having thus been allocated, the remainder of the net income as defined in section thirty shall be allocated as follows:

If a foreign business corporation carries on no business outside this commonwealth, the whole of said remainder shall be allocated to this commonwealth.

If a foreign business corporation carries on any business outside this commonwealth, the net income taxable under this chapter shall be determined as provided in section thirty-eight.

SECTION 42. A foreign corporation carrying on part of its business outside the commonwealth may, in lieu of the allocating method required by the preceding section for determining the amount of business assignable to this commonwealth, refuse

to accept such determination by notification thereof to the commissioner on or before the time when its income tax return under this chapter is due to be filed. Such a foreign corporation shall, within thirty days thereafter, file with the commissioner, under oath of its treasurer, a statement in such detail as the commissioner shall require, showing the amount of its annual net income derived from business carried on within the commonwealth. The commissioner may require such further information with reference thereto as he may deem necessary for the assessment of the tax, and shall determine the proportion of the net income received from business carried on within the commonwealth.

SECTION 43. After determining the amount of tax due from any foreign corporation under paragraph (2) of section thirty-nine, the commissioner shall then credit the corporation with a sum equal to five per cent of the dividends paid by it, during the previous calendar year, to inhabitants of this commonwealth, and the amount then remaining due shall be the amount of tax to be levied upon the corporation under said paragraph; provided, that if more than one half of the capital stock of any such corporation is owned by another foreign corporation not subject to taxation under sections thirty to fifty-one, inclusive, but has stockholders who are inhabitants of this commonwealth and are subject to taxation upon their income under section one of chapter sixty-two, such corporation, upon filing with the commissioner such information as he shall deem necessary for the purpose, shall be credited with a sum equal to five per cent of such a proportion of its total dividends as will prevent double taxation of the income of the corporation and of the dividends of such other foreign corporation actually taxed to inhabitants of this commonwealth.

. . . . . .

SECTION 47. The commissioner shall make from time to time such reasonable rules and regulations, consistent with

sections thirty to fifty-one, inclusive, as he may deem necessary for carrying out their provisions.

. . . . . .

SECTION 52. If the excise imposed by section thirty-two on domestic business corporations, or that imposed by section thirty-nine on foreign corporations, is declared unconstitutional by a final judgment, order or decree of the United States supreme court or the supreme judicial court of the commonwealth, sections thirty to fifty-one, inclusive, shall be null and void, and all laws repealed or made inoperative by chapter three hundred and fifty-five of the General Acts of nineteen hundred and nineteen shall thereupon be revived and continue in full force and effect as if the said chapter had not been enacted. In such case the commissioner and local assessors shall forthwith assess all taxes that have become due under such prior laws, and the time for making any assessment or performing any other duty imposed or privilege granted by such laws shall be extended for a period of six months after the date when they are thus determined to be in force, and the time within which corporations may apply by petition to the supreme judicial court under section seventy-seven for the abatement of the excise imposed by section thirty-two, or of that imposed by section thirty-nine, shall be extended for the same period. If any part, section or subdivision of said sections thirty to fifty-one, inclusive, other than the provisions in sections thirty-two and thirty-nine imposing an excise, shall be declared unconstitutional, the validity of the remaining parts of said sections thirty to fifty-one, inclusive, shall not be affected thereby."

GENERAL LAWS, CHAPTER 156.

"SECTION 2. Except as expressedly made applicable by reference in subsequent chapters, this chapter shall not apply to corporations organized for the purpose of carrying on the business of a bank, savings bank, co-operative bank, trust com-

pany, credit union, surety or indemnity company, or safe deposit company, or for the purpose of carrying on within the commonwealth the business of an insurance company, railroad, electric railroad, street railway or trolleymotor company, telegraph or telephone company, gas or electric light, heat or power company, canal, aqueduct or water company, cemetery or crematory company, or to any other corporations which now have or may hereafter have the right to take land within the commonwealth by eminent domain or to exercise franchises in public ways granted by the commonwealth or by any county, city or town. It shall apply to all other domestic corporations having a capital stock and heretofore or hereafter established either by general or special law for the purpose of carrying on business for profit except as provided in chapter one hundred and fifty-seven and except so far as such application may be inconsistent with provisions still in force of any special acts of incorporation, enacted before March eleventh, eighteen hundred and thirty-one, and not subject to amendment, alteration or repeal by the general court, or with provisions of any special acts of incorporation hereafter enacted; and this chapter shall govern the amount of real or personal estate which any corporation subject to it may hold, and the right to increase or decrease its capital stock, notwithstanding the provisions of any special act of incorporation, except in the case of corporations empowered to manufacture, store, transmit, sell or distribute power.

It shall also apply to agricultural or horticultural organizations, instituted for purposes of mutual help, which corporations, if formed for the purpose of doing business at cost for the benefit of their members, shall not be required to have capital stock."

ACTS OF 1921, CHAPTER 361.

"SECTION 1. The tax assessed in the year nineteen hundred and twenty-one in accordance with the provisions of section thirty-two of chapter sixty-three of the General Laws and the

tax assessed against any foreign corporation in accordance with the provisions of section thirty-nine of said chapter sixty-three shall be not less than an amount equal to one twentieth of one per cent of the said corporation's gross receipts from business assignable to this commonwealth as defined in clause six of section thirty-eight of said chapter sixty-three.

SECTION 2. All provisions of chapters fifty-eight and sixty-three of the General Laws relative to assessment, collection, payment, abatement, penalties, distribution and administration shall, so far as pertinent, be applicable to taxes under this act."

ACTS OF 1921, CHAPTER 493.

"SECTION 1. Every corporation subject to the provisions of sections thirty to sixty, inclusive, of chapter sixty-three of the General Laws, shall pay, in addition to all other taxes, an excise tax at the rate of three quarters of one per cent of its net income as herein defined and apportioned to this commonwealth. 'Net income' shall mean the net income of said corporations for the period covered by their return of income to the federal government due next prior to April first, nineteen hundred and twenty-one, subject to the provisions of the following sections.

. . . . . .

SECTION 5. The proportion of the net income taxable under this act in cases of corporations carrying on business outside of this commonwealth shall be as follows: — In the case of a corporation deriving profits principally from the ownership, sale or rental of real estate, and in case of a corporation deriving profits principally from the sale or use of tangible personal property owned by it, such proportion as the fair cash value of its real estate and tangible personal property in this commonwealth on April first of the current year is to the fair cash value of the entire real estate and tangible personal property owned by it on that date with no deduction on account of any encumbrance thereon.

In the case of a corporation deriving profits principally from the holding or sale of intangible property such proportion as its gross receipts assignable to this commonwealth for the year covered by its return is to its gross receipts for such year within and without the commonwealth.

In case neither of the above methods is applicable, the commissioner of corporations and taxation shall determine, in such manner as he deems equitable, the proportion of the net income received from business carried on within this commonwealth.

The apportionment of net income to this commonwealth as provided in this section shall apply to all corporations, domestic or foreign, which are taxable under this act."